STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 24, 1999
v	No. 195638 Calhoun Circuit Court
EUGENE BRANDON MOORE, Defendant-Appellant.	LC No. 95-001799 FC

Before: McDonald, P.J., and Kelly and Cavanagh, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree criminal sexual conduct (CSC), MCL 750.520b(1)(c); MSA 28.788(2)(1)(c), and first-degree home invasion, MCL 750.110; MSA 28.305. The trial court sentenced defendant to concurrent terms of fifteen to twenty-five years' imprisonment for the first-degree CSC conviction and four to twenty years' imprisonment for the home invasion conviction. Defendant appeals as of right. We affirm.

In his sole issue on appeal, defendant argues that the trial court erred in refusing to instruct the jury to consider the lesser offense of fourth-degree criminal sexual conduct, MCL 750.520e; MSA 28.788(5). This Court reviews jury instructions in their entirety to determine if there is error requiring reversal. Even if jury instructions are imperfect, there is no error if they fairly presented the issues to be tried and sufficiently protected the defendant's rights. *People v Whitney*, 228 Mich App 230, 252; 578 NW2d 329 (1998).

Relying on *People v Stephens*, 416 Mich 252; 330 NW2d 675 (1982), defendant argues that he was entitled to an instruction on the misdemeanor offense of fourth-degree CSC because it is a lesser included offense of first-degree CSC. Defendant is in error. Fourth-degree CSC is not a lesser included offense of first-degree CSC; rather, it is a cognate lesser offense of first-degree CSC. *People v Baker*, 103 Mich App 704, 712-713; 304 NW2d 262 (1981). A cognate lesser offense is one which shares some common elements with and is of the same class or category as the greater offense, but also has some elements not found in the greater offense. *People v Perry*, 460 Mich 55, 61; ___ NW2d ___ (1999); *People v Hendricks*, 446 Mich 435, 443; 521 NW2d 546 (1994). A requested instruction on a cognate lesser offense must be given where there is evidence that would support a

conviction of the cognate lesser offense. Under this standard, there must be more than a modicum of evidence; there must be sufficient evidence that the defendant could be convicted of the lesser offense. *People v Pouncey*, 437 Mich 382, 387; 471 NW2d 346 (1991).

Defendant maintains that the evidence supports a finding that he engaged only in unwanted sexual contact, rather than actual penetration. We disagree. The complainant testified that defendant penetrated her vagina with both his finger and his penis. While the incident was occurring, defendant told Robert Burke, who had been speaking to the complainant on the telephone, "I'm f---ing your girlfriend." The complainant told Brian Monaghan shortly after the incident that she had had sex with defendant. Defendant himself bragged to Monaghan, "I f---ed her dude."

At trial, no testimony or other direct proof that penetration did not occur was presented. Nevertheless, defendant argues that an instruction on fourth-degree CSC was supported by reasonable inferences from the evidence. However, none of the facts on which defendant relies establish that the sexual contact with the complainant did not include penetration. Although the medical evidence did not conclusively establish that penetration occurred, it did not rule out the possibility. Veronica Schoonard's testimony that both defendant and the complainant were clothed when she entered the house can be reconciled with the complainant's testimony. Moreover, Schoonard did not testify that penetration did not occur. Defendant notes that the complainant was in the middle of a telephone conversation during the assault, but did not report what was happening or ask for help; however, we do not find persuasive defendant's implicit assertion that complainant would have asked for help if defendant were penetrating her but would not have asked for help if defendant were only engaging in inappropriate sexual contact. Finally, defendant argues that the jury could rationally have concluded that defendant's comment to Burke was simply an attempt to provoke the latter. However, even assuming this to be true, it does not establish that defendant engaged only in sexual contact less than penetration.

In sum, the trial court correctly found that the evidence cited by defendant does not support his contention that penetration did not occur. Because no evidence was presented that defendant engaged only in sexual contact less than penetration, the trial court did not err in denying defendant's request for an instruction on fourth-degree CSC. See *Pouncey*, *supra*. The trial court's instructions fairly presented the issues to be tried and sufficiently protected defendant's rights; accordingly, defendant is not entitled to any relief. See *Whitney*, *supra*.

Affirmed.

/s/ Gary R. McDonald
/s/ Mark J. Cavanagh